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No. 07-1193

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In The

Supreme Court of the United States

KRISTEN DAY, ET AL.,

Petitioners,

v.

RICHARD BOND, Chairman of the Kansas Board of Regents, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Petitioners are college students challenging a state statute that allows certain undocumented aliens to pay in-state tuition at Kansas colleges. The statute does not affect Petitioners. Nevertheless, they seek to strike down the statute as a violation of a federal immigration law and of their equal protection rights.

1. In a purported preemption challenge based on conflict with a federal immigration law (8 U.S.C. § 1623), where Petitioners' sole claim of injury is the alleged violation of that law, did the Circuit Court correctly look to such law to determine if Petitioners suffered a judicially cognizable injury sufficient to confer standing?

2. In an equal protection challenge to college tuition rates, must plaintiffs show they qualify for in-state rates under the criteria they do not challenge in order to meet Article III's standing requirements?

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STATUTES INVOLVED

Respondents note the following statute, not listed by Petitioners, is also relevant to the Court's decision:

8 U.S.C. § 1103(a)(1) (2004) provides:

> The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, . . .

STATEMENT OF THE CASE

This case solely concerns the routine application of this Court's well-established rules of standing. Petitioners are college students who object to the tuition rates paid by other students. Petitioners disagree with the Kansas policy reflected in K.S.A. 76-731a and have focused ideological fury at its link to undocumented aliens. But the federal courts were never intended to be battlegrounds for ideological disputes seeking to invalidate a state's laws. The Constitution limits the federal courts to cases and controversies in which plaintiffs have actual injuries a federal court can redress. Petitioners lack standing here because, other than their personal dissatisfaction with the public policy represented by K.S.A. 76-731a, the statute causes them no injury, and even complete victory would leave them in a position no different than they are in now.

Petitioners call their first claim a claim of preemption, but they presented no evidence to the District Court that the state statute in question actually affects them. The Circuit Court's application of this Court's rules on standing was made unique only by the Petitioners' disavowal of any injury other than a right allegedly arising under a federal immigration statute, 8 U.S.C. § 1623. Respondents are not aware of any case – and Petitioners have not cited one – that finds standing to bring such a claim in this context.

Their second claim is an equal protection claim, but Petitioners admit they do not qualify for in-state tuition under the statute's criteria requirements of high school attendance and graduation in Kansas – criteria they do not challenge. The certainty of their disqualification defeats Petitioners' standing because their claimed injury will not be redressed by granting their requested relief. Under well-established standing jurisprudence, such a disconnect between the claimed injury and requested relief is a clear indication that the Petitioner is seeking to insert the courts in a matter of public policy, rather than resolve a legitimate "case or controversy." Notwithstanding the uncommon factual context of this case, however, the simple application of well-established standing rules, makes this case inappropriate for the grant of certiorari.

A. Petitioners' Claims

Petitioners challenge a Kansas statute, K.S.A. 76-731a, which grants resident tuition rates to certain non-domiciliary students. Petitioners are U.S. citizens who are either enrolled in, or are parents of students at, post-secondary educational facilities governed or supervised and coordinated by the Kansas Board of Regents.[1] The student Petitioners are all non-residents for purposes of payment of tuition, fees and certain other expenses (collectively "tuition").

Contrary to Petitioners' repeated suggestions, the Kansas statute does not simply award in-state tuition to illegal aliens. Rather, the statute allows certain students – aliens or not – to pay in-state tuition at Kansas colleges if they meet certain criteria. To qualify, students must:

(1) have attended a Kansas high school for at least three years (K.S.A. 76-731a(b)(2)(A));

(2) have either graduated from a Kansas high school or obtained a Kansas GED (K.S.A. 76-731a(b)(2)(B));

(3) sign a prescribed affidavit (K.S.A. 76-731a(b)(2)(C));

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[1] The nine-member Board of Regents governs Kansas' six public universities and supervises 30 other institutions. K.S.A. 74-3202a, 3202c.

(4) not hold a valid student visa (K.S.A. 76-731a(c)(1)); and

(5) not be eligible for resident tuition at any other state's post-secondary schools (K.S.A. 76-731a(c)(2)).

None of the Petitioners attended, graduated from, or obtained a GED from a Kansas high school.

Petitioners sued in seven counts, but appealed the dismissal of only two claims: Count 2 – "Violation of 8 U.S.C. § 1623"[2] and Count 7 – "Violation of Equal Protection Clause." Petitioners continue to press those two claims here.

Before the District Court, Petitioners asserted that the sole injury giving rise to both claims was the monetary difference between the non-resident tuition paid by Petitioners and the resident tuition paid by those students who qualify pursuant to K.S.A. 76-731a. On appeal, however, Petitioners identified different injuries for their different claims. For their statutory/preemption claim, they expressly disavowed any injury other than "an injury to a legal interest"

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[2] 8 U.S.C. § 1623 provides (emphasis added):

> [A]n alien who is not lawfully present in the United States shall not be eligible *on the basis of residence* within a State (or a political subdivision) for any post-secondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

created by a federal immigration statute, 8 U.S.C. § 1623.[3] As a remedy, they sought invalidation of the Kansas statute.[4]

For the equal protection theory, Petitioners reformulated their theory into four alleged injuries: (1) a general denial of equal treatment; (2) financial harm based on increased future tuition; (3) competition over scarce tuition resources; and (4) financial harm based on increased past tuition.[5] Petitioners sought four remedies:

> (1) an injunction barring the State Defendants from granting resident tuition to undocumented aliens;
>
> (2) a declaration that K.S.A. 76-731a is unconstitutional to the extent it provides resident tuition for undocumented aliens;
>
> (3) an injunction barring the State Defendants from discriminating between Petitioners and undocumented aliens in the provision of resident tuition until the

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[3] Petitioners' Tenth Circuit Reply Brief at 5.

[4] Amicus Washington Legal Foundation (WLF) mistakenly combines the relief Petitioners sought when it claims Petitioners also sought a refund of excess tuition. WLF Brief at 5, n.4. Petitioners sought a "refund" of excess tuition only with respect to its equal protection claim. The only relief sought for the federal statutory claim was invalidation of the state statute. *See* Petitioners' Tenth Circuit Reply Brief at 5.

[5] Petitioners' Tenth Circuit Opening Brief at 25, 33-35.

allegedly unconstitutional practices of K.S.A. 76-731a are no longer in effect; and

(4) compensation for the "extra tuition" paid since July 1, 2004 via an injunction mandating tuition credits or rebates.[6]

In other words, Petitioners asked the Court to prospectively order the Regents' schools to charge them resident tuition for as long as any undocumented alien receives it.

B. The Decisions Below

The District Court entered summary judgment on Petitioners' preemption claims – including Count 2 – for lack of standing.[7] To the extent Count 2 was intended as an enforcement action, the Court held that 8 U.S.C. § 1623 did not create a private right of action. Last, the Court dismissed Count 7 for lack of standing. It issued these rulings after allowing discovery and the opportunity to present whatever evidence and arguments the parties had to offer.

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[6] This last remedy is baseless, as the Eleventh Amendment prohibits money judgments and other retrospective relief against states and state officials sued in their official capacity and any form of declaratory or equitable relief that establishes entitlement to monetary awards. *Green v. Mansour*, 474 U.S. 64, 68-73 (1986). Just as importantly, Petitioners never sought such relief in their Amended Complaint.

[7] Petitioners' Appendix B at 28a-62a.

In their initial brief on appeal, Petitioners did not even contest the District Court's holding that they lacked standing to assert Count 2 as a preemption claim. They only addressed the issue of whether the federal statute created a private right of action, and whether such a right was necessary to bring the claim.[8] After State Defendants pointed out their omission, Petitioners claimed their sole alleged injury was "an injury to a legal interest" created by the federal statute. Petitioners' Tenth Circuit Reply Brief at 5-6.[9] The Tenth Circuit unanimously affirmed the dismissal, holding that Petitioners lacked standing to bring both the preemption and equal protection claims.[10]

Petitioners sought rehearing and rehearing *en banc* claiming many of the same conflicts they claim here. As the Court noted in its order denying rehearing *en banc*, no judge of the Circuit called for a poll, and the petition was denied. Petitioners' Appendix D at 96a, n.2.

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[8] Petitioners' Appendix A at 1a-27a.

[9] Thus, contrary to the statements of Amicus Washington Legal Foundation, WLF Brief at 9-10, n.9, the issue of standing to bring count 2 *was* fully briefed prior to the Panel decision. *See* State's Brief at 20-27 ("Plaintiffs Lack Standing To Bring A Section 1623 Preemption Claim."); Plaintiffs' Reply Brief at 1-8 (arguing in favor of standing); Petitioners' Appendix at 19a, n.7 ("both sides have had the opportunity to develop fully their legal and factual arguments" regarding standing).

[10] *Day v. Bond*, 500 F.3d 1127, *reh'g denied*, 511 F.3d 1030 (10th Cir. 2007).

Before explaining why this case is unworthy of certiorari, Respondents briefly mention the following important points. First, and contrary to the statements of Petitioners and Amici,[11] Kansas universities *have* provided in-state tuition under K.S.A. 76-731a to non-resident citizens. For example, at the time of the district court proceedings, five of the seven Wichita State University students paying in-state tuition under the statute were U.S. citizens who were not Kansas residents. *See Day v. Sebelius*, D.Kan. Case No. 04-4085-RDR, Docket No. 74 (Ex. 2). Indeed, the District Court found this fact as part of the record below, noting that the Petitioners "have only identified a handful of students who have been able to take advantage of K.S.A. 76-731a, and *most of those are not illegal aliens*." Petitioners' Appendix B at 47a (emphasis added). Petitioners' claim to the contrary can only charitably be called misleading. Given that the District Court relied on an *adjudicative fact* to the contrary in granting summary judgment below, such misstatements before this Court are highly questionable and troubling.

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[11] *See* Petition for Certiorari at 8 (wrongly stating, "No such benefit was provided to U.S. citizens who are not residents of Kansas."). Amicus Washington Legal Foundation, et al., (WLF) repeats this misstatement, claiming (with no record support) that "every U.S. citizen qualifies as a domiciliary resident of at least one State." WLF Brief at 15, n.10. While in theory that may be true, the reality is different. Here the record shows that U.S. citizens who are not Kansas residents also have qualified for in-state tuition. *See* Petitioners' Appendix B at 47a.

Second, and critical to the Circuit Court's resolution of the issues, the *only* injury Petitioners asserted as the basis for their standing to bring their preemption claim was the alleged statutory right under 8 U.S.C. § 1623 to receive in-state tuition. Having disclaimed all other injuries, Petitioners now find fault with the Circuit Court for correctly determining that, in fact, no such right exists.

REASONS FOR DENYING THE WRIT

The primary reason for denying the writ is that the Circuit Court's decision correctly recited and applied this Court's longstanding rules on standing. While Petitioners disagree with that ruling, nothing about it conflicts with this Court's opinions or those of the other Circuits.

I. The Tenth Circuit Did Not "Merge" the Doctrines of Standing and Private Rights of Action – It Merely Evaluated the Only Injury Petitioners Claimed.

Count 2 of Petitioners' Complaint was entitled "Violation of 8 U.S.C. 1623." In opposing dismissal, Petitioners claimed they sought "(1) a declaration that Kansas House Bill 2145 is preempted by federal law and (2) an injunction against enforcement of the

preempted statute."[12] The District Court held that to the extent this claim was a preemption claim, Petitioners lacked standing, and to the extent it was an action to enforce the federal statute, there was no private right of action. Petitioners' Appendix B at 49a-55a. The Circuit Court affirmed, holding that the Petitioners lacked standing.

In doing so, the Circuit Court's opinions carefully recited and applied this Court's rules on standing. The Circuit did not, as Petitioners claim, "merge" the doctrines of standing and private rights of action. Instead, the Circuit simply determined whether Petitioner's single chosen injury was an "injury in fact." As the Court noted, "Although Plaintiffs may generally bring a preemption claim without an implied private right of action, in this particular instance, they do not have standing to do so because they have asserted no separate injury." Petitioners' Appendix D at 101a. The Circuit Court thus explicitly recognized the general rule, but held it did not apply, because a federal right – one that did not exist – was the only injury on which Petitioners based their standing.

The Court was not wading through unknown territory. Indeed, the Circuit Court has acknowledged the difference between preemption claims and claims based on a private right of action. *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004). The

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[12] *Day v. Sebelius*, Case No. 04-4085, Docket No. 49 at 20.

Court noted *Qwest* in its order denying rehearing, stating that the holding here "does not conflict with *Qwest* because there this court did not determine that a plaintiff may bring a preemption claim without *standing*." Petitioners' Appendix D at 97a (emphasis in original).

Thus, the Circuit Court is entirely consistent with the other circuits in noting the analytical difference between the two doctrines. The application of these basic rules of federal jurisprudence was made unique only by Petitioners' apparently strategic disavowal of any injury other than the alleged violation of a federal law.[13] Petitioners apparently pursued

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[13] In a footnote, Petitioners acknowledge that the facts here are different than those of the cases they claim are in conflict, and they once again proclaim that no private right of action is necessary to bring a preemption claim. Petition for Certiorari at 20, n.12. But the cases they cite to support the latter proposition all involve cases that addressed precisely the same issue as *Qwest*: whether – as a matter of statutory subject matter jurisdiction – a private right of action was required to bring a preemption claim. *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006) (citing *Qwest*; no discussion of standing – plaintiff was injured by local ordinance); *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 225-26 (2d Cir. 1987) (no discussion of standing – plaintiff was injured by state regulation); *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324, 330-35 n.28 (5th Cir. 2005) (citing *Qwest*; explicitly discussing federal question jurisdiction, not standing – plaintiff was injured by state law); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269-71 (9th Cir. 1995) (no discussion of standing – plaintiff was affected by state regulatory action).

(Continued on following page)

such a strategy because, as the courts below properly found, the state statute at issue simply does not affect them.

A. Standing Versus a Right of Action – There Is No "Circuit Split"[14]

Petitioners claim that the Circuit Court's decision conflicts with decisions of the Second, Fifth, and Ninth Circuits.[15] They are wrong. Each of their cited cases do nothing more than recite the difference between standing and rights of action. The cases do not address a situation like this one, where the plaintiff's "preemption" claim is based solely on an alleged statutory right.

First, in *Bowman v. Wilson*, 672 F.2d 1145 (3rd Cir. 1982), which Petitioners mistakenly attribute to the Second Circuit,[16] the court merely recites the general principles relating to standing and private rights of action without addressing the question presented here. That case – a habeas proceeding – also bears no factual resemblance to this one. The Fifth Circuit in *Louisiana Landmarks Society, Inc. v.*

Unlike here, all of the plaintiffs in these cases were injured by the state or local law at issue. It was that injury that gave them standing, an injury Petitioners do not have.

[14] While Petitioners claim a circuit split exists, the supporting *Amici* tellingly make no such suggestion.

[15] Petition for Certiorari at 14.

[16] Petition for Certiorari at 19-20.

City of New Orleans, 85 F.3d 1119 (5th Cir. 1996), likewise did not address the issue here. Indeed, it did not even address the issue of standing. Rather, it found no private right of action and reversed on that basis alone. *Id.* at 1125. The Ninth Circuit in *Bernhardt v. County of Los Angeles*, 279 F.3d 862 (9th Cir. 2002), also recites the principle that generally standing and a right of action are separate issues, but otherwise the case is unremarkable. The court there found standing because the plaintiff was unable to find counsel and blamed a city policy that refused to pay attorneys' fees in settling civil rights claims.

These cases show no conflict: they all recite and apply the same legal principles the Circuit Court did in this case – that courts generally must make an independent determination of standing irrespective of whether the plaintiff has a private right of action. None of these cases discuss whether, when, or under what conditions one might borrow from cause of action jurisprudence to evaluate whether an injury exists, and none dealt with the situation we have here – where Petitioners have disclaimed any injury other than the violation of an alleged statutory right while denying they seek to enforce it. With no conflict, intervention by this Court is neither appropriate nor necessary.

B. The Tenth Circuit Did Not Narrow the Concept of "Judicially Cognizable Interest" – It Applied the Concept to the Only Injury Petitioners Claimed.

Petitioners claim that the Circuit Court narrowed the concept of a "judicially cognizable interest" and created a conflict with other courts. Petition for Certiorari at 23. But they fail to cite a single case that conflicts with the Circuit Court's decision. To demonstrate the fallacy of Petitioners' arguments, we revisit the Constitution's standing requirements.

To satisfy Article III standing, Petitioners must establish three elements: (1) "injury in fact" – meaning "the invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal relationship between the injury and the challenged conduct" – meaning that the "injury fairly can be traced to the challenged action of the defendant"; and (3) "a likelihood that the injury will be redressed by a favorable decision" – meaning that the "prospect of obtaining relief from . . . a favorable ruling is not too speculative." *Ne. Fla. Chapter of Assoc. Gen Contractors of Am. v. Jacksonville,* 508 U.S. 656, 663-64 (1993) (internal citations and quotations omitted). In addition, there are prudential reasons why courts must refrain from adjudicating "generalized grievances" or "abstract questions." *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). Standing is not measured by the intensity of a party's commitment, fervor, or aggression in pursuit of its alleged right and remedy.

See Doremus v. Board of Educ., 342 U.S. 429, 434-35 (1952); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 225-26 (1974); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982); *Diamond v. Charles*, 476 U.S. 54, 62 (1986). Nor is the perceived importance of the asserted right a substitute for constitutional standing. *See Valley Forge*, 454 U.S. at 484-85. "'[T]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.'" *See id.* at 489 (quoting *Schlesinger*, 418 U.S. at 227).

"[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). This Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *United States v. Hays*, 515 U.S. 737, 743 (1995).

The Circuit Court's decision must be considered in light of Petitioners' consistent variations in their alleged injury and sought-after relief. For their "preemption" claim, Petitioners essentially conceded they were not affected by the Kansas statute. Instead, their only injury was the alleged denial of "the right of U.S. citizen students to receive 'any postsecondary education benefit' offered to 'any alien who is not

lawfully present in the United States.'" *See* Petitioners' Tenth Circuit Reply Brief at 7.[17] As the Panel duly noted, "The Plaintiffs have disclaimed on appeal any injury other than an invasion of the legal right that they assert § 1623 has vested in them and any remedy other than the presumptive annulment of § 76-731a." Petitioners' Appendix A at 19a.

The Circuit Court found no such right, and Petitioners point to no other court that has. Thus, its decision creates no conflict with other decisions. Indeed, prior to taking up the private right of action question, the Circuit Court correctly recognized that, absent such a right, "the Plaintiffs would retain only a generalized interest in the Defendants' compliance with the law." *Id.* This conclusion is consistent with other courts that have found no rights or interests created by general immigration laws. *See Federation for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 903 (D.C. Cir. 1996) (interest in limiting the effects of immigration was too widespread, and commonality of alleged injury to entire population prevented standing); *Sadowski v. Bush*, 293 F. Supp. 2d 15 (D.D.C. 2003) (plaintiff lacked standing to enforce immigration laws). It also is consistent with the fact

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[17] Petitioners conveniently and repeatedly omit the component of 8 U.S.C. § 1623 that limits the restricted benefits to those awarded "on the basis of residence." Thus, despite Plaintiffs' characterizations, nothing in Section 1623 prohibits awarding benefits to an undocumented alien on some other basis.

that enforcement of Section 1623 is expressly delegated to the Secretary of Homeland Security.[18]

These common rules of standing are precisely what the Circuit Court applied. Petitioners' "preemption" theory is one intended only to void actions that affect third parties, not Petitioners themselves. Courts routinely reject such cases for lack of standing. *See FAIR v. Reno*, *supra*; *Sadowski v. Bush*, *supra*; *Talenti v. Clinton*, 102 F.3d 573, 577 (D.C. Cir. 1996) (plaintiff lacked standing to compel President to withhold foreign aid); *Branton v. FCC*, 993 F.2d 906, 910-11 (D.C. Cir. 1993) ("The Supreme Court is particularly disinclined to find that the causation and redressability requirements [for standing] are satisfied where a complainant challenges only an Executive Branch decision not to impose costs or penalties upon some third party.").

Thus, as the Circuit Court noted, absent a private right, Petitioners have no interest – legally cognizable or otherwise – to bring a preemption claim, because even a successful outcome would only affect third parties. Petitioners cite no case that conflicts with the Circuit Court. Indeed, this Court has rendered similar decisions. For example, in *McConnell v. Federal Election Comm'n*, 540 U.S. 93,

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[18] *See* 8 U.S.C. § 1103(a)(1) (2004) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter *and all other laws relating to the immigration and naturalization of aliens*, . . .") (emphasis added).

227 (2003), this Court held that plaintiffs whose claimed injury was the right to participate equally in an election process based on their economic status had no standing to challenge elections laws, because their claimed injury was "not to a legally cognizable right."

Here, however, Petitioners' allegations of conflict amount only to a complaint that the Circuit Court misconstrued their alleged injury. Petitioners' effort to manufacture this illusory conflict is abetted by their penchant for restating and recharacterizing their injury whenever it suits their purpose. In their Petition, Petitioners' assert that their injury is primarily to the "right" supposedly guaranteed by Section 1623. Petition for Certiorari at 23. At the Circuit, they claimed their injury "occurs irrespective of any financial injury." Petitioners' Tenth Circuit Reply Br. at 7. Now, however, they claim an interest in the "benefit" of in-state tuition that "has significant financial value." Petition for Certiorari at 23. And moreover, Petitioners depart from their contention that their injury is solely the affront to the purported right embodied in Section 1623, and return to again explicitly seeking enforcement of the Section 1623, as they claim to seek to "enjoin Respondents to reimburse Petitioners for the excess tuition and fees charged to them." Petition for Certiorari at 9.

Petitioners' repeated confusion and recharacterization of their alleged injury and sought-after relief presented an unusual challenge, forcing the Circuit Court to implicitly answer whether Petitioners are

actually bringing a preemption claim as they insist, or trying to enforce Section 1623. Petitioners have given different answers to the question. In their initial circuit brief, Petitioners sought to explain that a preemption claim is *different* than an enforcement claim. Citing cases from the Second and Eighth Circuits, the Petitioners wrote:

> a claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law. Accordingly, a claim under the Supremacy Clause simply asserts that a federal statute has taken away local authority to regulate a certain activity. In contrast, an implied private right of action is a means of enforcing the substantive provisions of a federal law.

Petitioners' Tenth Circuit Opening Br. at 8 (quoting *Western Air Lines, Inc. v. Port Auth.*, 817 F.2d 222, 225 (2d Cir. 1987) and *Wright Elec., Inc. v. Minn. State Bd. of Elec.*, 322 F.3d 1025, 1028 (8th Cir. 2003)). In their reply brief, however, Petitioners argued *just the opposite*, ignored the cases they cited, and claimed, "there is *no difference* between the 'two' claims . . . they are one and the same." Petitioners' Tenth Circuit Reply Brief at 3 (emphasis added).[19]

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[19] Amicus WLF frequently disparage the Circuit's alleged "confusion" regarding the nature of the claim in Count 2. *See, e.g.*, WLF Brief at 8, n.8, and at 9, n.9. To the extent the Circuit was confused, Petitioners caused the confusion.

Throughout this litigation, Petitioners want to have it both ways, but as they acknowledged (initially) to the Circuit Court, the claims are different, because they seek different remedies.

If Petitioners truly are bringing a preemption claim, they lack standing because they have no legally cognizable interest in the benefit of in-state tuition paid by other students.[20] Additionally, the

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[20] *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (nonprofit association challenged state statute that restricted members from doing business with Massachusetts); *Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644 (2003) (drug companies challenged state statute which threatened to impose a prior authorization requirement on plaintiffs' prescription drug sales to coerce companies into reducing prices); *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003) (HMO's challenged "Any Willing Provider" statute, which prohibited health benefit plans from discriminating against providers willing to meet conditions for plan participation); *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424 (2002) (tow truck operator challenged city regulations requiring tow-truck operators to obtain city licenses, submit to city inspections, and conform their vehicles to detailed equipment requirements); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (cigarette manufacturers challenged Massachusetts regulations restricting sale, promotion, and labeling of tobacco products); *United States v. Locke*, 529 U.S. 89 (2000) (oil-tanker owners challenged Washington state statute regulating tankers already regulated by federal law); *Foster v. Love*, 522 U.S. 67 (1997) (voters challenged Louisiana statute setting open Congressional elections in October, with runoff – if necessary – set for November election day); *De Buono v. NYSA-ILA Medical and Clinical Servs. Fund*, 520 U.S. 806 (1997) (fund which owned and operated hospitals challenged state statute imposing 0.6% tax on hospitals' gross receipts).

remedy in a successful preemption claim – nullifying the state statute – would provide no basis to award the Petitioners in-state tuition or grant them any other relief.

As this Court's preemption cases demonstrate, preemption requires plaintiffs to be affected by the state action at issue. Petitioners are not so affected. K.S.A. 76-731a only affects the price certain students pay to go to college. The only people affected by resident tuition charged to students pursuant to K.S.A. 76-731a are the students who satisfy its requirements – and Petitioners are not among them. Prior to enactment of K.S.A. 76-731a, Petitioners paid non-resident tuition rates, and after enactment of K.S.A. 76-731a, Petitioners continue to pay non-resident tuition.

Because they are not affected by the state statute, Petitioners can only have an injury and a remedy if they are created by the federal statute. Indeed, Petitioners based their standing to bring their self-described "preemption" claim solely on the basis of that imagined federal right. Thus, it is that "right" they seek to enforce. No matter how many times Petitioners call their action one of preemption, such action amounts solely to an effort to enforce Section 1623 – a right the Circuit Court correctly concluded Petitioners do not have.

Correct or not, however, there are no cases that conflict with Petitioners' imaginative (and confused) legal theory. Granting certiorari would not resolve

any split among the circuits on a rule of law, and the petition for writ of certiorari should be denied.

II. There Was No Existing Circuit Split Regarding the Scope of *Jacksonville*, and the Tenth Circuit's Decision Did Not Create One.

Petitioners assert that the Panel's dismissal of their equal protection challenge for lack of standing conflicts with *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656 (1993), and with cases in other circuits. In fact, the Panel cited and applied *Jacksonville* to the present case. Petitioners' disagreement with that application does not create a conflict for this Court to resolve.

In *Jacksonville*, this Court found standing for a trade group of contractors to challenge a program that required 10% of the amount spent on city contracts be set aside for minorities. The plaintiff contractors "regularly bid on construction contracts in Jacksonville." 508 U.S. at 668. The Court held:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the

> denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.[21]

Petitioners quote this holding,[22] but they ignore the language that came next:[23]

> To establish standing, therefore, a party challenging a set-aside program like Jacksonville's ***need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis***.[24]

The Court did *not* hold that a roofer had standing to challenge a plumbing contract, or that a paving company could challenge an electrical contract. That is what "able and ready" means, and that "able and ready" requirement is what the Circuit Court applied, when it held, citing *Jacksonville*, "While it is indisputable that standing to assert an equal protection claim does not require that a plaintiff show that he *would* have obtained the benefit but for the discriminatory effects of a government-erected barrier, the plaintiff must nevertheless demonstrate that he *could* have obtained the benefit." Petitioners' Appendix A

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[21] *Id.* at 666 (citations and quotations omitted).

[22] Petition for Certiorari at 27 (calling their selective quote – but not their omission – "pregnant with meaning").

[23] Nearly all of the cases Petitioners claim are in conflict with the Circuit Court's decision in this case also do not address this sentence.

[24] 508 U.S. at 666 (footnote omitted, emphasis added).

at 16a (emphasis in original). The Circuit Court further explained:

> If . . . a plaintiff cannot do so because nondiscriminatory classifications would disqualify him from eligibility for the benefit even absent the challenged discriminatory classification, he cannot show injury caused by the discrimination, nor can he show injury that would be redressed by a decision in his favor; he therefore lacks standing to bring his claim. Similarly, in a case concerning the denial of an equal opportunity to compete, such as . . . *City of Jacksonville* . . . , the plaintiff must show he is not disqualified from competing because of nondiscriminatory eligibility criteria and that the allegedly discriminatory eligibility criteria impaired his opportunity successfully to compete for the benefits offered.[25]

Because Petitioners did not meet the unchallenged, nondiscriminatory criteria in K.S.A. 76-731a (e.g., attending a Kansas high school for three years and graduating or obtaining a GED from a Kansas high school), they lacked standing. That holding is entirely consistent with *Jacksonville* and other decisions of this Court. *See, e.g., United States v. Hays*, 515 U.S. 737, 743 (1995) ("The rule against generalized grievances applies with as much force in the equal protection context as in any other.").

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[25] Petitioners' Appendix A at 16a-17a (citations omitted).

A. The Tenth Circuit's Decision Is Perfectly In Line with Other Circuits.

The cases Petitioners cite as being in conflict simply do not discuss the "able and ready" analysis or factual scenarios where non-discriminatory criteria disqualify the plaintiff. One need only review the case Petitioners cite as having the "most direct conflict" to see why no conflict exists and the Petition should be denied.

In *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 496 (7th Cir. 2005), the plaintiff Lac Du Flambeau (LDF) tribe had submitted an application for a casino in Wisconsin. Their application required approval by the Secretary of the Interior and a negotiated compact with the State of Wisconsin. LDF challenged a provision in a compact another tribe, the Ho-Chunk Nation, had negotiated with Wisconsin and the Secretary had approved. That provision gave Ho-Chunk a competitive advantage by requiring Wisconsin to indemnify it for any losses caused by new casinos opened by other tribes. The Seventh Circuit held that LDF had standing to challenge the provision. It did so by rejecting the notion that the harm was too conjectural, holding, "The *possibility* that Wisconsin *might* reject LDF's application for legitimate reasons is

therefore irrelevant to the standing analysis." 422 F.3d at 498 (emphasis added).[26]

The Circuit Court in this case did not deal with a *possibility* of rejection, it dealt with a *certainty* – the Petitioners here are disqualified due to the non-discriminatory and unchallenged criteria of the statute. The Seventh Circuit's opinion does not address such a scenario and does not conflict with the decision in this case.

Neither does the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 863 (8th Cir. 2006), in which the standing analysis consists of one short paragraph. There, public interest groups with gay and lesbian members challenged a constitutional amendment invalidating same-sex relationships. The Court noted that the amendment had already been the basis for legislative action rejecting a new law, and found that the amendment was therefore an "injury in fact." Nowhere did the Court discuss the issue of standing as applied to a plaintiff affirmatively disqualified from marrying by some other unchallenged criteria.

Likewise, the Ninth Circuit's "discussion" of standing in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003), consists

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[26] *See also Petit v. City of Chicago*, 352 F.3d 1111, 1113 (7th Cir. 2003) (affirming dismissal for lack of standing in equal protection employment case where plaintiffs would not have been promoted regardless of the conduct they challenged).

of a one paragraph footnote. In *Silveira*, the court dealt primarily with a Second Amendment challenge to California's assault weapons ban. The decision is factually distinctive from this case and has already been called "doctrinally quite unsound[.]" *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), *cert. granted sub nom District of Columbia v. Heller*, 128 S.Ct. 645 (D.C. Cir. 2007). But like the other cases Petitioners cite, it nowhere addresses the standing questions of causation and redressability, and instead only holds (as did the Circuit Court here) that the plaintiffs were injured. It certainly did not deal with a situation like this one, where unchallenged, non-discriminatory criteria disqualified the plaintiffs from what they sought.

At the Second Circuit, *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996) was a case where the defendants did not even contest standing. The plaintiffs were homosexual service-members challenging the military's "don't ask-don't tell" policy, the relevant part of which was alleged to bar them from engaging in homosexual acts. The district court had dismissed that part of their challenge for lack of standing, reasoning that it could not assume the plaintiffs would find third parties to participate with them in homosexual acts. The Circuit Court correctly reversed, but that decision in no way conflicts with the case here. First, *Able* had nothing to do with public benefits – the plaintiffs there were not seeking to compete or apply for a government benefit; they were challenging a ban on their conduct. Second, the court

nowhere addresses the issue here: unchallenged, non-discriminatory criteria that disqualify plaintiffs from what they seek, regardless of court action.

The Second Circuit also did not address disqualifying factors in *Williams v. Lambert*, 46 F.3d 1275 (2d Cir. 1995). There, the plaintiff was the mother of an illegitimate child, and she sought to modify her child support. She challenged a New York statute that required her motion to modify to be evaluated differently than it would have been had the child been legitimate. The court held that – like *Jacksonville* – she need not demonstrate ultimate success on her modification motion. She had standing because her claim simply sought to remedy the higher level of scrutiny her motion would have received. The ruling is perfectly consistent with *Jacksonville*, and it has nothing to do with a case like this, where Petitioners were not "ready and able" to apply for in-state tuition due to unchallenged, non-discriminatory criteria.

Similarly, *Rockefeller v. Powers*, 74 F.3d 1367 (2d Cir. 1995), has no application here. There, the plaintiffs were voters who challenged election rules. Those rules, the plaintiffs claimed, reduced the number of people that would appear on the ballot. The defendants argued that a change in the rules would not guarantee additional ballot choices and that therefore the plaintiffs lacked standing. The court cited *Jacksonville* and found the plaintiffs had standing, but like the rest of Petitioners' cases, it made no mention of whether the plaintiffs would have had standing had some other, unchallenged rule, barred them from

voting. It is that situation that is analogous to this case, and thus *Rockefeller* creates no conflict.

The D.C. Circuit's cases fare no better. In *Worth v. Jackson*, 451 F.3d 854 (D.C. Cir. 2006), the plaintiff challenged HUD's affirmative action plans that he claimed would injure him when he applied for new positions. He had already unsuccessfully applied for several jobs. He did not challenge any of those decisions, but did challenge the race and gender-biased policy of the agency, and he only sought prospective relief. The court found standing. Again, however, it did not discuss a situation like this one, where non-discriminatory criteria disqualified the Petitioners from the benefit they seek.

Settles v. United States Parole Commission, 429 F.3d 1098 (D.C. Cir. 2005) is the same. It involved a regulation that prevented prisoners in contract prisons from having representation at parole hearings but allowed representation to those in federal facilities. The plaintiff brought an equal protection challenge to the rule and sought a new hearing where he could have representation. The court correctly found standing, even though the plaintiff could not prove that his parole hearing would have been successful if he had representation.

It is worth noting that Petitioners claim the *Worth* case "suggests" that *Jacksonville* "only applies to affirmative action plans" and the *Settles* case held it was not so limited. The Petitioners misrepresent these cases. *Worth* suggested no such thing. It simply

recited *Jacksonville*'s facts and holding and applied it to a job applicant. Nothing about that holding "suggests" the limitation that Petitioners want to create. *Settles* did precisely the same thing, simply applying *Jacksonville* to a different fact pattern, just as this Court would expect it to do. In short, faced with no conflicting court rulings, Petitioners are stuck with trying to manufacture one.

Even if the D.C. Circuit had "suggested" an internal conflict, this Court does not exist to review or comment on the "suggestions" of the courts below. Rather, this Court's job is to ensure that the different Circuit Courts are applying the same rules of law. They are.

Indeed, most of the Circuits supposedly in conflict have rendered decisions entirely consistent with the Circuit Court below. The Seventh Circuit dealt with this scenario and reached the same result in *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge*, 9 F.3d 1290 (7th Cir. 1993). There, the plaintiff challenged restrictions in the city's sign and zoning codes. But it did not challenge the restriction that signs be no more than 200 square feet, and the plaintiff wanted to erect a sign six times as large. Finding no standing, the court noted: "Harp does not contest the validity of this ordinance; its proposed billboard, six times as large as Chicago Ridge allows, therefore will never appear. This litigation is irrelevant." *Id.* at 1291.

The Second, Eighth, and Ninth Circuits have reached similar conclusions where plaintiffs failed to qualify under unchallenged criteria. *See, e.g., Boucher v. Syracuse University*, 164 F.3d 113, 116 (2nd Cir. 1999) (plaintiffs challenged the alleged unequal allocation of benefits between varsity men's and women's teams; held, since none of the plaintiffs were varsity athletes, they did not have standing) *Grahek v. City of St. Paul*, 84 F.3d 296, 298-99 (8th Cir. 1996) (non-minority plaintiffs lacked standing to challenge the police department's employment practices where, even absent the alleged discrimination, plaintiffs would not have been chosen); *Carroll v. Nakatani*, 342 F.3d 934, 942-43 (9th Cir. 2003) (plaintiff was not "able and ready" to compete on an equal basis for loan in program he challenged on equal protection grounds, because his application was incomplete, he failed to formulate a business plan, and had no work history, among other things); *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 474-76 (9th Cir. 2001) (plaintiff contractor sought ERISA preemption of ordinance requiring that all benefits provided to married employees also be provided to employees with registered domestic partners; but plaintiff stipulated that it would not extend the non-ERISA benefits to such employees even if it meant losing the contract. Held, plaintiff would be ineligible for city contracts even if the ordinance were preempted as to ERISA benefits, thus, he lacked standing).

The cases cited by Petitioners consistently recite, apply, and demonstrate *Jacksonville*'s rule: Where a

plaintiff seeks to obtain or compete for a government benefit, it need not demonstrate that it will ultimately be successful; it simply must show that it is otherwise qualified to compete (i.e., is "able and ready"), and removing the allegedly discriminatory barrier would allow it to compete on an equal basis. That is exactly the rule the Circuit Court applied. It simply found that Petitioners were not otherwise qualified.

Jacksonville needs no further explanation. Even if it did, this case would not be the appropriate vehicle, and the Petition for Writ of Certiorari should be denied.

B. The "Absurd Results" Argument

Petitioners try to incite the Court's passions by claiming they sit in the same position as blacks challenging a whites-only program.[27] But this analogy is bogus because here the allegedly discriminatory aspect is only one of several criteria. Petitioners do not qualify because they fail to meet clearly *non*-discriminatory criteria – they still did not attend and graduate or obtain a GED from a Kansas high school.

III. The "Dead Letter" Argument

In a final stroke of desperation, Petitioners claim that this Court cannot allow the decision below to

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[27] Petition for Certiorari at 33-34.

stand, or 8 U.S.C. § 1623 will be "a Dead Letter."[28] They claim that this case seeks to recognize the "substantive right" created by that law. They miss the fact that the Circuit Court found there was no such right – a holding they do not even challenge in this Court.[29]

Petitioners then cite the comments of a Senator and a Congressman as evidence that Congress intended to create a private right of action.[30] But the cited comments say nothing about private rights. In fact, they support the argument that no private right was intended. The Senator's comments indicate the statute is a simple prohibition on what States can do, saying, "Without the *prohibition*, . . . States will be able to make illegals eligible. . . ." 142 CONG. REC. S11508 (Sept. 27, 1996) (statement of Sen. Simpson) (emphasis added). The Congressman's statements also do not refer to Section 1623 as the source of any rights. Instead, it refers to the general "rights that Americans take for granted." Just as importantly, the comments directly contradict the arguments of *amici* that Section 1623 was not a simple prohibition, *see* WLF Br. at 22-23, and Petitioners' claim that Section 1623 was not "an outright prohibition." Petition for Certiorari at 7. Thus, the Senator's statements and

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[28] Petition for Certiorari at 34.

[29] While Petitioners do not challenge this holding, Amicus Mountain States Legal Foundation (MSLF) argues at some length that this issue was wrongly decided. MSLF Brief at 10-13.

[30] Petition for Certiorari at 35.

the statute's placement in the immigration code all demonstrate that no one envisioned new rights or private lawsuits by disgruntled college students.

Petitioners include in their addendum a declaration from former Senator Alan Simpson that Congress did intend to create a private right of action. Petitioners' Addendum at 116a. Senator Simpson's declaration came nine years after the passage of Section 1623 and speculates about the "general impression" of unnamed members of Congress. These comments, made years after this statute was enacted – and submitted by amicus for the first time while the case was on appeal[31] – are of little value in determining Congressional intent. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 644 n.17 (1981) ("Courts, of course, should be wary of relying on the remarks of a single legislator . . ."); *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 563 n.18 (1979) ("The comments . . . of a single Congressman, delivered long after the original passage of the [act at issue], are of no aid in determining congressional intent . . ."). Thus, whatever Senator Simpson and his fellow Congress members may now wish the statute contained or they had said at the time, their post-hoc declarations provide no basis for construing a private right – a conclusion that Petitioners do not even challenge in this Court.

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[31] Because the Senator's declaration was not part of the district court record, this Court should disregard it.

Of course, the fact that there exists no private right of action does not make a statute a "dead letter." The State of Kansas firmly believes that it has obeyed the law – that its statute fully comports with 8 U.S.C. § 1623. Americans everywhere commonly obey laws where no private right of enforcement exists. They obey the law despite (indeed, most often without knowing) the fact that private parties may not haul them into court if they go astray. After all, the law may always be enforced by those whose job it is to enforce it. Here, that job belongs to the Secretary of Homeland Security, not Petitioners. *See* 8 U.S.C. § 1103(a)(1) (2004).

CONCLUSION

The decision below accurately recited and applied this Court's clear rules on the issue of standing. The Petition fails to demonstrate a conflict for this Court to resolve, and its unique circumstances limit its value as precedent in future cases. Accordingly, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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